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EASTERN WATER LAW™

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EASTERN WATER NEWS

ENVIRONMENTAL GROUPS BRING FEDERAL CLEAN WATER ACT SUIT AGAINST EPA OFFICIALS ALLEGING FAILURE TO REVIEW CHANGES TO WATER QUALITY STANDARDS

The Natural Resources Defense Council, The Bay Institute, and Defenders of Wildlife (plaintiffs) have filed a lawsuit in U.S. District Court for the Northern District of California under the federal Clean Water Act (CWA) alleging the U.S. Environmental Protection Agency (EPA) has failed to review and take appropriate action regarding revisions to water quality standards in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary Water Quality Control Plan (Bay-Delta Plan) and the Water Quality Control Plan for the Sacramento River Basin and San Joaquin River Basin, 4th Edition (Central Valley Plan). The lawsuit alleges temporary water rights orders by the California State Water Resources Control Board (SWRCB) in 2014, 2015 and 2016 "effectively" revised the Bay-Delta Plan and Central Valley Plan. The orders were issued pursuant to Water Code § 1435 *et seq.* in response to temporary urgency change petitions by the U.S. Bureau of Reclamation (Bureau) and California Department of Water Resource (DWR). [*Natural Resources Defense Council, et al. v. Gina McCarthy, et al.*, Case No. 4:16-cv-02184-JST, *filed* Apr. 22, 2016 (N.D. Cal.).]

Background

The Bay-Delta Plan, adopted by the SWRCB, designates beneficial uses, water quality objectives and a plan of implementation for the Bay-Delta Estuary, as required by state law. The Bay-Delta Plan is reviewed periodically in compliance with state and federal law. The most recent update to the Bay-Delta Plan was approved by the SWRCB in 2009. Similar to the Bay-Delta Plan, the Water Quality Control Plan for the Sacramento River Basin and San Joaquin River Basin, 4th Edition (Central Valley Plan) designates beneficial uses, water quality objectives and a plan of implementation for the Central Valley outside of the Delta. The Central Valley Regional Water Quality Control Board adopted the Central Valley Plan.

The SWRCB has implemented the Bay-Delta Plan and Central Valley Plan, in part, through terms and conditions it has imposed in the water rights permits and licenses for the Central Valley Project (CVP), operated by the Bureau, and State Water Project (SWP), operated by DWR. In Revised Decision 1641, issued on March 15, 2000, the SWRCB imposed a number of terms and conditions on these water rights permits and licenses, including requiring the Bureau and DWR to operate the projects to achieve various water quality objectives, e.g., a maximum limit for salinity. *See, e.g.*, Revised Water Right Decision 1641, at §§ 7.0, 9.0, and 10.0, and at Order, pp. 146-180.

Beginning in late January 2014, the Bureau and DWR jointly filed several temporary urgency change petitions (TUCPs) pursuant to California Water Code § 1435 to temporarily modify water right conditions for the CVP and SWP, respectively. *See* SWRCB, State Water Project and Central Valley Project Temporary Urgency Change Petition, available at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/index.shtml. The petitions sought to modify permit conditions to address severe drought conditions. For example, in their January 28, 2014 TUCP, the Bureau and DWR explained that:

> …forecasts by Reclamation and DWR indicate[d] there [was] not an adequate water supply to meet water right permit obligations under Water Rights Decision 1641 (D-1641) to support instream and Delta beneficial uses. Jan. 28, 2014 TUCP, p. 1.

In response, the SWRCB has issued a number of emergency orders, most recently in early 2016. With each of these orders, the SWRCB has approved or denied—in whole or in part—the requested modifications to the terms and conditions of the Bureau and DWR's water rights. Under these orders, the Bureau and DWR were partially and temporarily relieved from obligations under their permits to operate the

CVP and SWP to maintain certain of the water quality objectives in the Bay-Delta Plan and Central Valley Plan. The SWRCB also imposed new conditions and requirements on the projects to address the effects of the ongoing drought.

Under § 303 of the CWA, EPA must review new or revised "water quality standards" adopted by the states to determine whether they are consistent with the requirements of the CWA. 33 U.S.C. § 1313(c). States must submit new or revised water quality standards to EPA for review. If EPA finds a new or revised standard is not consistent with the CWA, EPA must so notify the state within 90 days of submission, and identify what changes are necessary to meet the requirements of the CWA. If the state fails to adopt such changes, then EPA must promulgate a standard itself.

The Clean Water Act Litigation

According to the plaintiffs, the emergency orders issued by the SWRCB are "effectively" revisions to California's approved "water quality standards" in the Bay-Delta Plan and the Central Valley Plan, and thus must be reviewed by EPA under § 303. The SWRCB did not submit the orders to EPA for review under § 303, nor has EPA undertaken such review on its own initiative. Plaintiffs argue that the EPA:

> …has failed to carry out its mandatory federal oversight role by ignoring SWRCB's ongoing and intermittent pattern of revising the Bay-Delta Plan and Central Valley Plan water quality standards.

Plaintiffs allege that the orders "weakened" water quality standards intended to benefit fish and wildlife, including requirements related to flow, export, salinity, dissolved oxygen and operation of the Delta Cross Channel gates. Plaintiffs allege the changes allowed by the SWRCB resulted in "disastrous" effects on threatened and endangered fish species in 2014 and 2015.

Plaintiffs seek declaratory relief that the SWRCB's orders in 2014, 2015 and 2016 were subject to EPA review under § 303, and that EPA failed to carry out its duties under § 303. Plaintiffs seek injunctive relief requiring the EPA to review, and take appropriate action in response to, "any current or planned revision" to the water quality standards in the Bay-Delta Plan or Central Valley Plan. In addition, plaintiffs seek injunctive relief requiring the EPA to "notify" the SWRCB that its orders were revisions to water quality standards, and that any current or planned revisions may not go into effect or be implemented until EPA review and approval is complete.

Conclusion and Implications

In response to California's drought, and the urgent need to modify project operations, the Bureau and DWR relied upon the temporary urgency change procedure to obtain temporary modifications to the water rights permits and licenses of the CVP and SWP. The plaintiffs contend those water rights changes were in effect revisions to water quality standards, and hence subject to EPA review and approval under § 303 before they could take effect.

If plaintiffs are successful in this suit, and if the SWRCB is required obtain EPA review and approval of such future changes to water rights permits, the immediate effect would be to significantly slow down, and as a practical matter preclude, access to urgently needed permit changes pursuant to Water Code § 1435 *et seq*. It is not clear that the SWRCB will be so required even if plaintiffs prevail, however. The SWRCB is not a party to the suit, and under the Eleventh Amendment enjoys immunity from suit in federal court. More broadly, the suit implicates the distinctions between water quality regulation, in which the federal government has a substantial role, and water rights regulation, in which it does not. It appears plaintiffs' longer range goal may be to use § 303 to push EPA to assume a new role, regulating water rights.

(Rebecca Akroyd, Daniel O'Hanlon)

NEWS FROM THE WEST

This month in News from the West focuses on legislation that focuses on water supply and infrastructure in the driest, most water supply challenged part of the nation. On the federal level, the U.S. Senate approves of an amendment to the federal Secure Water Act of 2009 for funding of water projects. Also at the federal level, Arizona leaders testify at a U.S. Subcommittee hearing regarding Senate Bill "The Western Water Supply and Planning Enhancement Act" to address water diversions from the Colorado River via Lake Mead. Finally, we look to events at the Colorado Legislature—with some hits and some misses.

U.S. Senate Approves Amendment to Secure Water Act of 2009 Providing Funding for Water Projects in the Parched West

In a vote that received little attention or fanfare, the U.S. Senate approved an amendment (S Amdt.3805: Amemdment) to the Secure Water Act of 2009, which provides needed funding to water projects throughout the West. The amendment was the work of two Senators who sit across the aisle from each other while also sharing the home state. Nevada Senators Harry Reid (D) and Dean Heller (R) said in a joint statement that the amendment will help Nevada and other western states deal with record drought conditions and water shortages along the Colorado River.

The Amendment provides $450 million to a grant program run by the U.S. Bureau of Reclamation (Bureau). The grant program is designed to fund the planning, designing, or constructing of improvements to:

- Conserve water;
- Increase water use efficiency;
- Facilitate water markets;
- Enhance water management;
- Accelerate the adoption and use of advanced water treatment technologies to increase water supply;
- Prevent the decline of endangered species;
- Accelerate the recovery of threatened species, endangered species, and designated critical habitats that are adversely affected by Federal reclamation projects; or
- Carry out any other activity to address any climate-related impact to the water supply or prevent any water-related crisis or conflict at any watershed that has a nexus to a Federal reclamation project. (*See,* 42 U.S.C. 10364.)

The Amendment conditions the funding on the requirement that $50 million of the funds be used for reclamation projects and to construct, operate, and maintain several specific water storage facilities (*i.e.* dams and reservoirs) in Colorado, New Mexico, and Utah. (*See,* 43 USC § 620.)

Some of the grant money is distributed under the Bureau's WaterSMART program. WaterSMART aims to improve water conservation and sustainability. The program identifies strategies to ensure the availability of sufficient amounts of clean water for drinking, economic activities, recreation and ecosystem health. The program also identifies adaptive measures to address climate change and its impact on future water demands.

Since 2009, the Bureau has provided more than $174 million in funding through WaterSMART grants to states, tribes and other partners. That funding was leveraged with more than $426 million in non-federal funding to complete more than $600 million in improvements, which are expected to result in annual water savings of more than 570,000 acre-feet, enough water for more than 2.2 million people.

The appropriated funds also support the Colorado River System Conservation Program. During the past 16 years, the drought in the Colorado River Basin has resulted in a substantial decrease in Lake Powell and Lake Mead storage. Since 2000, Colorado River water storage has decreased from 94 percent to about 50 percent of capacity. The Bureau predicts that there is a 17 to 37 percent probability of shortage in the lower Colorado River Basin as early as 2017, increasing to a 59 percent probability in 2018. Given declining reservoir levels, the Bureau, the Colorado River Basin

States, and water agencies within the Colorado River Basin States have been actively working together and discussing proactive strategies to mitigate the impacts of the ongoing drought.

On July 30, 2014, the Bureau executed an agreement with the Central Arizona Water Conservation District, The Metropolitan Water District of Southern California, Southern Nevada Water Authority, and Denver Water for a Pilot Program for Funding the Creation of Colorado River System Water through Voluntary Water Conservation and Reductions in Use, as amended (Funding Agreement). The Funding Agreement was historic because water agencies from both the Upper and Lower Colorado River basins and the Bureau agreed to jointly fund voluntary water conservation projects in the Upper and Lower Colorado River basins for the benefit of the Colorado River System.

The Bureau's Lower Colorado Region is the implementing agency for the Pilot Program in the Lower Basin. The projects approved to date, will collectively conserve approximately 60,000 acre-feet of Colorado River water in Lake Mead.

Arizona Leaders Testify at U.S. Subcommittee Hearing Regarding Senate Bill: 'Western Water Supply and Planning Enhancement Act'

On Tuesday, May 17, 2016, Arizona's leaders testified at the Senate Energy and Natural Resources subcommittee regarding Senator Jeff Flake's Western Water Supply and Planning Enhancement Act, Senate Bill S 2902 (Bill). The purpose of Senate Bill S 2902 is: "To provide for long-term water supplies, optimal use of existing water supply infrastructure, and protection of existing water rights."

More specifically, the Bill is aimed at: 1) long-term improvements for western states subject to drought; 2) protecting existing water rights; 3) completing and maintaining rural water supply infrastructure; and 4) offsets for accelerated revenue, repayment and surface water storage enhancements.

Part of the Bill up for debate was the current "gentleman's agreement" regarding the various states' use of water from Lake Mead. (*See*, recent Vox article *Lake Mead helps provide water to 25 million people. And it just hit a record low.* http://www.vox.com/2016/5/23/11736340/lake-mead-water-drought-southwest)

Officials in Arizona are asking for stricter restrictions on withdrawing water from Lake Mead, including prohibiting states from withdrawing water that was put into the lake by other states.

The Director of the Arizona Department of Water Resources, Thomas Buschatzke, explained to the subcommittee that the December 2014 Memorandum of Understanding was a "best efforts agreement" to target a volume of 740,000 acre-feet of water to be stored in Lake Mead through the system conservation water and Intentionally Created Surplus agreements. Director Buschatzke further testified that while the Intentionally Created Surplus agreement allows Arizona, Nevada and California to store water in Lake Mead for a year and recover it for future use, the conservation water is not available for future recovery. Arizona has already contributed a significant amount of conservation water into Lake Mead—120,000 acre-feet through 2015 with an expected additional 45,000 acre-feet for 2016 for a total of 165,000 acre-feet. Arizona has always been a leader in water conservation and storage and has the ability to use its own aquifers within the state for storing water for future use. But, Arizona is committed to creating and protecting water volume and is asking for assurance through this Bill that the "system water will remain as system water to the benefit of the Basin States." In summary, Director Buschatzke states, "Arizona needs more certainty that the water is going to stay in Lake Mead if we're going to keep putting water there."

Arizona Senator John McCain, also a sponsor of the Bill, declared the problem of drought in the West as "crucial, critical" and one that requires the states to work together which is something the Bill encourages. However, not everyone at the hearing agreed. Estevan Lopez, Commissioner of the U.S. Bureau of Reclamation, stated that the Bill did "not appear to currently have consensus support among all seven Colorado River Basin States." Lopez did concede that interstate cooperation was essential and said efforts were being made to find a solution to generate support, but that the Bill "may distract from the ongoing efforts to identify consensus tools and mechanisms to contribute to conservation" efforts. Lopez went on to testify that the Bill is unnecessary in this regard because it is duplicative of current policies and agreements that are already in place.

Other components of the Bill, which are particularly important to Arizona, deal with wetland

restoration and fire management. The Bill proposes ways to streamline the permitting process in order to return damages areas to a healthy condition. Director Buschatzke testified that conditions in some areas are nearing a crisis stage and that previous "well-intentioned yet restrictive administrative and regulatory constraints, have been counterproductive." The debris from intense wildfires has a negative impact on reservoirs, which are crucial to water supply and drought management. Likewise, the loss of trees creates runoff that can also be harmful to the water supply, which can have long-term effects not only to the immediate areas, but to other surrounding communities. In addition, the Bill proposes a plan to deal with salt cedar plants, which are intrusive and require a great deal of water. Director Buschatzke says the plants have "choked" many waterways and Senator McCain feels the plants consume "so much water" and need "to be eradicated." Commissioner Lopez appeared to agree with the Bill's sponsors in this regard who will work together going forward to address these issues.

A complete copy of the current Bill can be viewed at: http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=53DAF900-A83E-4E90-A183-EA58BF56CB16

In the West Where Life Is Written In Water—Another Water Heavy Year at the Colorado Legislature

The Second Regular Session of the 70th Colorado General Assembly adjourned on May 11, 2016. This year, like many others, a variety of water related bills were proposed. Three notable water bills met varying fates. After previous failed attempts, Governor Hickenlooper signed a bill to allow residential rain barrels for precipitation collection. The Governor also signed a bill short titled the Colorado Water Rights Protection Act into law. And a bill limiting the introduction of new evidence on groundwater appeals failed to make it out of committee.

House Bill 16-1005

On May 12, 2016, Governor Hickenlooper signed into law HB 16-1005, a bill that will allow but regulate precipitation harvesting. Currently, Colorado law outlaws rooftop precipitation collection with limited exceptions. This restriction, however, is frequently described as often flouted and rarely enforced. Despite that inconsistency and the lack of enforcement, this legislation now amends Colorado law and officially allows up to two fully enclosed rain barrels with some limitations. These barrels would be limited to a storage capacity of 110 gallons to collect rainwater from the rooftops of single-family residences or multi-family residences of four or fewer units only. Use of the collected water is limited to outdoor purposes on the property on which it was collected only. The bill requires the Colorado State Engineer to collect information on the impacts this practice has on existing water rights. The bill also extends the State Engineer's enforcement authority to curtail rain barrel use in instances of waste or injury to water rights or in times of drought. The State Engineer is then required to report back to the legislature in 2019 and 2022 on whether the use of rain barrels has caused any noticeable injury to downstream water rights.

A recent study conducted by Colorado State University's Water Center, however, concluded that residential rainwater harvesting would have no identifiable impact on downstream water rights. Despite conflicting views, the Rain Barrel Bill has been signed and Colorado now joins the rest of the nation in legalizing this practice and specifically joins Arizona, Oklahoma, and Utah in allowing, but regulating, rain barrel use. The Rain Barrel Bill officially takes effect on August 10, 2016.

House Bill 16-1109

On April 21, 2016, Governor Hickenlooper signed into law HB 16-1109, the Colorado Water Rights Protection Act. The bill works to protect state issued water rights on federal lands and was unanimously passed by the Colorado House and Senate. The motivation behind this bill comes from recent disputes with federal agencies over state issued water rights most notably the United States Forest Service's treatment of ski area water rights. Due to these conflicts, a diverse group of stakeholders drafted the bill which wielded legislative support across the political spectrum.

The bill itself confirms federal deference to state water law and that Colorado water rights are administered according to Colorado law and not administrative policies of the U.S. Forest Service or the U.S. Bureau of Land Management (BLM). Therefore, the

new law makes it clear that if a federal agency wants to own water rights in Colorado, it must apply and go through the water court process like any other party. The bill also directs the Colorado State Engineer not to enforce or administer efforts by the Forest Service or the BLM that aim to require transfer of title of water rights to the agencies, or restrict use of the water rights as a condition to a right-of-way, special use permit, or other authorization. The bill does note, however, that the text does not grant, confirm, deny, or impact any legal authority of the federal government to impose bypass flow requirements in connection with a special use permit or other authorization. Supporters have hailed the signing of the Colorado Water Rights Protection Act as a major victory as it further protects and removes uncertainty for water stakeholders and their investments in reliance on Colorado water law. The Colorado Water Rights Protection Act takes effect on August 10, 2016.

House Bill 16-1337

On April 26, 2016, HB 16-1337, a bill aimed at preventing new evidence from being presented in groundwater rights appeals failed to make it out of the Senate Judiciary Committee. Currently, state law allows for new evidence to be entered upon appeal when the issue reaches the water court. The bill's goal was to align the appeals process with that of other state panels which bar introduction of new evidence on appeal. Specifically, the bill would limit the evidence that may be considered when appealing a decision by the Ground Water Commission or State Engineer to a District Court. Under the bill and its proposed amendment to the law, the only evidence that a District Court could consider is that which was presented to the commission or State Engineer during the administrative proceeding. The District Court would then review the evidence and if it determines evidence was wrongly excluded it would be required to remand the matter back to the Commission or State Engineer.
(Wesley Miliband, Lee Storey, Chris Stork, Paul Noto, Robert Schuster)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlement—Water Quality

•On May 12, 2016, EPA, and the Minnesota Pollution Control Agency (MPCA) announced a $6 million agreement with the Southern Minnesota Beet Sugar Cooperative (SMBSC) to resolve federal Clean Water Act (CWA) violations at its processing facility near Renville, Minnesota. The company manufactures refined sugar, liquid sugar and other products from sugar beets. The Renville facility produces over 475,000 tons of sugar, 100,000 tons of dried and pelleted pulp and 10,000 tons of molasses from some 3 million tons of sugar beets. In 2013, SMBSC's Renville facility discharged more than 28 million gallons of untreated wastewater, exceeding MPCA discharge limits and causing a fish kill in Beaver Creek. The Consent Decree requires SMBSC to pay a $1 million civil penalty and provide injunctive relief estimated to cost $5 million. The company must model the volume of its wastewater ponds, carry out contingency plans to address forecasted violations and audit its wastewater piping systems.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•On April 18, 2016, EPA reached a settlement in a civil enforcement action against LHP, LLC, for alleged violations of the Lead Renovation, Repair and Painting (RRP) Rule in connection with renovation work done at one of its rental houses in Lincoln, Nebraska. As part of the settlement, the company will pay an $8,840 civil penalty to the United States. LHP, LLC, owns and rents numerous housing units in Lincoln.

•April 22, 2016, EPA and DOJ announced a settlement requiring OXY USA Inc., a subsidiary of Occidental Petroleum Company, to clean up contaminated water and sediments in the Ocoee River and one of its watersheds at the Copper Basin Mining District Superfund Site in Polk County, Tennessee. The settlement requires the company to spend an estimated $40 million to maintain and operate a water treatment system, prevent access by the public to contaminated water, and monitor contamination in the Ocoee River. In addition, OXY USA Inc. will reimburse EPA approximately $10.8 million toward costs incurred in its past cleanup actions at the site. The company will also reimburse EPA and the State of Tennessee for costs incurred by those agencies in overseeing the work required by the settlement.

•On April 26, 2016, EPA announced a settlement with Honolulu Wood Treating of Kapolei, Oahu, which will pay a $33,750 penalty for producing and selling a mislabeled pesticide on five occasions in 2013 and 2014 under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

•On April 26, 2016, EPA announced a settlement with Northern Indiana Public Service Co. to clean up contaminated soil at 12 residential properties and one municipal property near the Town of Pines Superfund site in Porter County, Indiana. NIPSCO will hire a contractor to conduct the cleanup and will pay all cleanup costs under the terms of the agreement. The properties slated for cleanup have elevated levels of arsenic, thallium and lead resulting from coal combustion byproducts. In November 2014, EPA required NIPSCO to begin sampling the soil at properties near the Town of Pines Groundwater Plume site. At EPA's direction, NIPSCO has expanded its soil sampling efforts to determine whether additional properties will require cleanup in the future.

•On April 28, 2016, EPA announced a settlement with Kawasaki Rail Car, Inc. (Kawasaki) of Yonkers,

New York, resolving its alleged violation of federal hazardous waste law. EPA inspections revealed the company had generated hazardous wastes and had stored these wastes without a permit. As part of the agreement, Kawasaki will come into compliance with all federal hazardous waste laws and pay a $71,120 penalty.

•On May 3, 2016, EPA announced a civil penalty issued to A.T. Still University of Health Science in Kirksville, Missouri after inspections revealed violations of the federal Resource Conservation and Recovery Act (RCRA) related to the storage and handling of hazardous waste. As part of the settlement, the university is required to pay a civil penalty of $11,233 to the U.S. Treasury. EPA representatives inspected the university's facilities in June 2014 and determined the university failed to perform waste determinations on multiple waste streams on the main campus.

•EPA announced a settlement on May 5, 2016, with SGL Automotive Carbon Fibers, LLC, for violating federal emergency planning, reporting and public notification laws. The violations took place at the international company's Moses Lake, Washington, fabrication facility and included failing to report storage of nitrogen and ammonium bicarbonate, as well as the unpermitted release of hydrogen cyanide and ammonia. On ten occasions from May 2012 through June 2014, ammonia and/or hydrogen cyanide were released to the atmosphere, but SGL failed to report to the National Response Center, the local emergency planning committee and the state emergency response commission. Besides the release of these dangerous gases, SGL failed to perform timely reporting of on-site storage of chemicals for calendar years 2011, 2012, and 2013.

•On May 12, 2016, EPA announced a settlement with Waters Technologies Corp., a Taunton, Massachusetts company that manufactures materials used in laboratory analysis, under which the company will pay $199,500 to settle claims that it violated state and federal hazardous waste laws. The company generates a range of hazardous wastes that include ignitable waste; corrosive waste; reactive waste; characteristically toxic waste; waste solvents, and off-specification waste. The case stems from a March 2014 inspection by EPA in which inspectors identified numerous RCRA violations. EPA alleged that the company failed to follow standards for the storage of hazardous wastes in tanks and to follow several regulations requiring the company to monitor potential air emissions from equipment that contains volatile organic waste. EPA also alleged that the company failed to ensure that waste solvents would not be released from its facility. The alleged violations could have resulted in releases of hazardous waste or hazardous waste constituents to the environment.

•On May 12, 2016, EPA announced that it issued an administrative complaint against Veolia ES Technical Solutions, L.L.C. for alleged violations of its federal hazardous waste permit at its Middlesex, New Jersey facility. The complaint directs Veolia to comply with hazardous waste management requirements and seeks fines up to $57,240 for Veolia's alleged failure to perform monthly emissions monitoring to detect leaks in the company's pumping equipment, and for failing to keep its hazardous waste containers closed.

•Under a Consent Decree lodged in federal court on April 22, 2016, ORB Exploration LLC (ORB) will pay $615,000 in federal civil penalties for the spills and other Clean Water Act violations, pay the Louisiana Department of Environmental Quality (LDEQ) $100,000 for civil penalties and response costs and carry out injunctive relief measures to improve spill response preparedness and prevent future oil spills. The Consent Decree resolves alleged violations of the Clean Water Act and state environmental laws stemming from three crude oil spills that occurred in 2013 and 2015 from two of ORB's Louisiana facilities at Frog Lake and Crocodile Bayou – both located in the Atchafalaya River Basin—as well as violations of Spill Prevention, Control and Countermeasure (SPCC) regulations at ORB's Frog Lake oil storage barge, announced the Department of Justice, U.S. Coast Guard (USCG) and the EPA.
(Andre Monette)

JUDICIAL DEVELOPMENTS

DISTRICT COURT GRANTS MOTION FOR RECONSIDERATION BRINGING DEFENDANT BACK INTO MTBE CONTAMINATED GROUNDWATER LITIGATION YEARS AFTER INITIAL DISMISSAL

Commonwealth of Puerto Rico v. Shell Oil Co.,
___F.Supp.3d___, Case No. 1:07-cv-10470 (S.D. N.Y. Apr. 15, 2016).

In 2012, the Commonwealth of Puerto Rico filed an amended complaint adding Trammo Petroleum and a related entity, Trammo Caribbean, Inc. (collectively: Trammo), to a pending action alleging that multiple defendants contaminated groundwater in Puerto Rico by using the gasoline additive methyl tertiary butyl ether (MTBE). Trammo moved to dismiss on April 12, 2013. On July 16, 2013, the district court granted Trammo's motion, dismissing Trammo from the case on statute of limitations grounds. Nearly three years later, the District Court vacated its prior decision, holding that changes in Puerto Rican law on the applicable tolling rule rendered the claims timely filed. After initially ruling that the dismissal was nevertheless proper because the U.S. District Court lacked personal jurisdiction over Trammo, the court held on a motion for reconsideration that Puerto Rico had established personal jurisdiction over Trammo, and Trammo should be reinstated as a defendant.

Background

Trammo's 2013 Motion to Dismiss

In its April 2013 motion to dismiss, Trammo argued that the statute of limitations had expired, Trammo Caribbean was dissolved and not subject to suit, and Puerto Rico could not show Trammo Petroleum ever conducted business in Puerto Rico such that it was subject to personal jurisdiction. After briefing ended on the motion to dismiss, but prior to the court's ruling on the motion, Trammo produced around 500 pages of documents that Puerto Rico asserted established personal jurisdiction over Trammo. However, these documents were not brought before the court. The court granted Trammo's motion to dismiss on statute of limitations grounds, declining to address the merits of Puerto Rico's personal jurisdiction arguments.

Puerto Rico's 2013 Motion for Reconsideration

Puerto Rico moved to reconsider the court's July 2013 decision granting the motion to dismiss, arguing that the court applied the wrong statute of limitations tolling rule. Puerto Rico asserted that the Puerto Rico Supreme Court had, in *Fraguada*, overturned the prevailing tolling rule—which applied the statute of limitations against each tortfeasor individually—in favor of a new rule—applying the statute of limitations against all co-tortfeasors as a group where an injured party alleged joint and several liability. The court declined to consider this argument as an impermissible attempt to reargue the same arguments previously considered.

Puerto Rico's 2014 Motion to Revise Prior Orders

On July 2, 2014, Puerto Rico filed a "Motion to Revise Prior Orders" based on a newly passed law in Puerto Rico that exempted certain claims from the statute of limitations. In response, Trammo argued the new law did not apply, and reiterated in the alternative that the court lacked personal jurisdiction. In reply to the personal jurisdiction argument, Puerto Rico submitted to the court for the first time some of the documents from Trammo's July 2013 production. The court denied the motion on statute of limitations grounds, concluding that the new law did not apply, or in the alternative, was unconstitutional. The court did not address Trammo's personal jurisdiction arguments.

2015 Motions for Summary Judgment

On June 12, 2015, two other defendants moved for summary judgment, asserting the same statute of limitations arguments previously asserted by Trammo. In response, Puerto Rico again argued that Puerto Rican law on the applicable tolling rule had changed, rendering its claims timely filed. This time Puerto Rico had the benefit of numerous intervening court decisions on the subject that provided almost unanimous support for its arguments.

On December 3, 2015, the court overruled the law of the case, holding that *Fraguada* overturned the old tolling rule and restarted the one-year statute of limitations. Because both the parties moving for summary judgment and Trammo were sued within the one-year statute of limitations, the court concluded that Puerto Rico's claims were timely filed against the movants and Trammo.

The court then proceeded to consider for the first time Trammo's arguments that it was not subject to personal jurisdiction. The court considered only the evidence presented in Puerto Rico's initial opposition papers and did not consider the additional documents submitted in Puerto Rico's July 2014 Motion to Revise Prior Orders.. The court concluded the evidence submitted with Puerto Rico's initial papers weas insufficient to support personal jurisdiction even when viewed in the light most favorable to Puerto Rico.

Puerto Rico's 2016 Motion for Reconsideration

In January 2016, Puerto Rico moved the court to reconsider its December 2015 opinion dismissing Trammo for a lack of personal jurisdiction. In support of its motion, Puerto Rico primarily relied on two newly submitted documents that were not a part of its Third Amended Complaint or its initial opposition to Trammo's motion to dismiss—a "Supply Agreement" and a "Frame Agreement" produced by Trammo in 2013 and 2015, respectively. Each showed that both Trammo Petroleum and Trammo Caribbean were involved in gas operations in Puerto Rico.

The District Court's Ruling

The court begain its analysis by noting that, because of the unusual procedural posture of the case, in particular the court's *sua sponte vacatur* of its prior opinion dismissing Trammo on statute of limitations grounds, the court had reason consider the newly discovered "Frame Agreement" and that the court had previously overlooked the Supply Agreement, which Puerto Rico had submitted in support of its 2014 Motion to Revise Prior Orders. The court found these documents were sufficient to establish that Trammo Petroleum was subject to personal jurisdiction because of its direct involvement in gas operations in Puerto Rico. The court found unpersuasive contradictory evidence and interpretations offered by Trammo, noting that Trammo requested:

> …layer upon layer of favorable inferences to permit [the] court to conclude that it does not have personal jurisdiction over [Trammo Petroleum]….Such findings would fly in the face of the motion to dismiss standard requiring the court to 'draw all reasonable inferences in favor of the plaintiffs.'

As a result, the court granted Puerto Rico's motion for reconsideration, vacated its earlier opinion on personal jurisdiction, and reinstated Trammo Petroleum as a defendant.

Conclusion and Implications

As the District Court recognized in its opinion, the specific events that led the court to reconsider years later whether Trammo properly was dismissed are unusual. Indeed, trial courts are particularly reluctant to reconsider such decisions. But as is clear from the court's decision, an intervening change in controlling law and the discovery of new evidence clearly provide opportunities for diligent and determined parties to revisit and alter unfavorable decisions.
(Conrad W. Bolston and Duke K. McCall, III)

DISTRICT COURT HOLDS THE CLEAN WATER ACT DOES NOT PREEMPT EPA'S ABILITY TO WITHHOLD PRODUCTION OF CONFIDENTIAL BUSINESS INFORMATION

Environmental Integrity Project v. U.S. Environmental Protection Agency, ___F.Supp.3d___, Case No. 14-1282 (JEB) (D. D.C. Mar. 29, 2016).

Within the context of the U.S. Environmental Protection Agency's (EPA) September 2009 decision to revise its decades-old regulations limiting pollution by steam-electric power plants, EPA obtained survey data from 700 steam-driven power plants as well as from vendors who sold equipment and services to these plants. EPA designed these surveys to collect data [wastewater discharges] about pollution and to gain insight into the plant-specific business operations, data that EPA would then use to prepare new federal Clean Water Act (CWA) regulations known as "effluent guidelines." In the midst of this process, plaintiffs filed a federal Freedom of Information (FOIA) request seeking certain data EPA obtained from those surveyed. EPA did not provide this data on grounds that it could be withheld under FOIA as confidential business information. Plaintiffs agreed but filed suit on grounds that the CWA independently requires the disclosure of such information, "thereby removing EPA's discretion to invoke FOIA as a basis for withholding." The District Court of the District of Columbia disagreed, holding that the CWA "does not expressly preempt EPA's ability to withhold this data."

Background

In June of 2010, EPA distributed its survey to 733 power plants, receiving response from all of them. These responses served as the "principal source of information used in developing" proposed rules, which were published in the *Federal Register* in June 2013. EPA also gathered data from vendors through presentations, conferences, and meetings, to gather information regarding the technologies used in the steam-driven power plant industry.

In July 2013, a bit before EPA issued its notice of proposed rulemaking, plaintiffs submitted a FOIA request seeking data and other information EPA obtained from its industry questionnaire. Specifically, plaintiffs sought:

> ….the amount of pollutants that individual power plants discharge to water bodies, data on the cost of wastewater treatment technologies, and data on how well those technologies perform in reducing pollutants that power plants discharge.

EPA provided some but not all of the requested data. As to what EPA withheld, it asserted that the power plants and vendors claimed that their data was "confidential business information," which is presumptively exempt from FOIA disclosure. Plaintiffs appealed EPA's determination to which EPA conducted a more in-depth analysis, including contacting the parties that produced the data to substantiate whether the withheld materials were properly characterized as confidential business information.

A year after submitting its FOIA request, plaintiffs still had no response from EPA regarding its analysis. In July 2014, plaintiffs filed this lawsuit seeking to force EPA to disclose the requested data. The parties agreed upon a schedule by which EPA would finalize its determination as to its confidentiality determination and release data not confidential. Complying with this schedule, in February 2015, EPA issued its final response to plaintiffs along with the production of nonexempt documents. The parties brought this matter to conclusion through cross motions for summary judgment.

The District Court's Decision

FOIA cases are typically decided on motions for summary judgment. A court may grant summary judgment based solely on information provided in agency affidavits or declarations when such:

> …describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controvert-

> ed by either contrary evidence in the record nor by evidence of agency bad faith. (*Larson v. Dep't of State* 565 F.3d 857, 862 (D.C. Cir.2009).)

Such evidence "are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." (*SafeCard Servs. Inc. v. SEC* 926 F.2d 1197, 1200 (D.C.Cir. 1991).) FOIA expressly places the burden on the agency to justify its action.

The court's focus was on the issue of:

> …should a court compel disclosure of documents exempt under FOIA where a *separate* statute, passed several years after FOIA was enacted, suggests that the agency must disclose them?

The Court held that at least as to CWA § 1318, the answer is no.

The Freedom of Information Act and the Clean Water Act

Although the basic objective of FOIA is disclosure--not all records requests must be honored as FOIA includes exemptions—nine of which are set forth in § 552(b). (*Dep't of Air Force v. Rose* 425 U.S. 352, 361 (1976).) In drafting FOIA, Congress:

> …struck a balance between the public's right to know and the government's need to keep information in confidence to the extent necessary. (*John Doe Agency v. John Doe Corp.* 493 U.S. 146, 152, 153 (1989).)….In refusing to contest whether EPA properly withheld the documents under FOIA, plaintiffs have forfeited their ability to use that statute as the vehicle to compel disclosure….With no 'improper[]' withholding having occurred, the Court lacks authority under FOIA's remedial provisions to order the requested relief. (*Id.*)

Plaintiffs argued that the issue is not over as CWA § 308 "requires EPA to make available to the public all of the requested technical data that it is withholding under Exemption 4." (33 U.S.C. § 1318.)

Section 1318 contains two relevant subsections: 1) § 1318(a) grants EPA broad authority to collect information as part of its statutory mandate to develop pollution regulations; 2) § 1318(b) places certain requirements on what EPA can or must do with that information. Plaintiffs read § 1318(b) to be structured analogously to FOIA—mandatory disclosure is the norm, and the only limited exception is for information properly classified as 'trade secrets. Under that interpretation, plaintiffs' alleged that EPA cannot presently withhold the data from disclosure because it concedes that at least some of the data was collected under § 1318(a) authority and because it agrees that none qualifies as 'trade secrets' (as opposed to simply confidential business information) as that term is understood in the FOIA context. EPA responded that the term "trade secrets' has the same meaning in both statutes

> …arguing that the agency has a long history of treating confidential business information as 'trade secret' information under the [CWA], even though FOIA makes clear that those are two entirely distinct concepts.

Does the Clean Water Act Provide the Basis for Compelling Disclosure?

The District Court did not find the need to resolve this argument instead taking the simpler path of addressing the issue of whether the CWA "offers any basis for compelling disclosure here." As plaintiffs relied entirely on FOIA and admit that the data is properly classified as confidential business information, plaintiffs could only succeed if the CWA somehow modifies FOIA to preclude EPA's ability to rely on its exemptions. The court found that § 12 of the Administrative Procedure Act provides that:

> a subsequent statute may not be held to supersede or modify this subchapter…except to the extent that it does so expressly.' This provision applies broadly to the APA, including FOIA. (*Id.*; quoting from *Church of Scientology of California v IRS* 792 F.2d 146, 149 (D.C.Cir.1986).)

Conclusion and Implications

In the end, the court found that the U.S. Environmental Protection Agency can withhold data about power plant wastewater discharges from them. The court found that the CWA does not require disclosure of confidential business information that is exempt

from disclosure under FOIA. Although Plaintiffs argued that the CWA provision making certain data publically available created an independent requirement mandating disclosure, the court ruled that the CWA did not alter applicability of the FOIA provision and upheld EPA's decision to withhold the information.
(Thierry Montoya)

JUDICIAL PANEL ON MULTIDISTRICT LITIGATION DENIES REQUEST TO CONSOLIDATE WATER QUALITY SUITS AGAINST MONSANTO SEEKING PCB REMEDIATION COSTS

In re: Stormwater/Impaired Waters PCB Contamination Litigation,
___F.Supp.3d___, MDL Case No. 2697 (J.P.M.L. Apr. 7, 2016).

The U.S. Judicial Panel on Multidistrict Litigation (Panel) denied a motion from six cities in the States of Washington and California seeking to consolidate and transfer lawsuits filed by the cities to the U.S. District Court for the Northern District of California. Each suit asserts public nuisance arising from marine contamination caused by the presence of polychlorinated biphenyls (PCBs) produced by Monsanto Company. The Panel found that despite the shared questions of fact regarding the allegations of PCB contamination, the fact that each suit was brought by a different municipality regarding a different body of water implicated enough differing questions that would necessarily be raised in each case that centralization was not warranted. Further, the Panel held that because all actions are proceeding in the Ninth Circuit, and because Monsanto has pledged to cooperate to avoid duplicative discovery, that consolidation and transfer is not necessary to protect the interests of consistency and economy.

Factual and Procedural Background

The Cities of San Jose, Oakland, Berkeley, San Diego, Spokane, and Seattle each filed lawsuits against the Monsanto Defendants alleging water contamination from PCBs manufactured by Monsanto. Throughout the 1930s-1970s, Monsanto was the sole North American manufacturer of PCBs, a toxic substance banned by Congress in the 1970s for its numerous health risks. Over a billion pounds of PCBs were produced for use in products such as paint, caulking, plasticizers, coolants, lubricants, building materials, hydraulic fluid, and other industrial and commercial uses. Over the years, through runoff, PCBs have migrated from their intended sources and have traveled to bodies of water and leached into sediment where they have remained, as PCBs do not degrade in the environment. According to the U.S. Environmental Protection Agency (EPA), the contaminants have ended up in over 6,000 bodies of water in the U.S. Subsequently, PCBs have bioaccumulated and biomagnified as they have been ingested by all members of the food chain.

The U.S. Environmental Protection Agency is authorized to regulate the amounts of PCBs in various water sources, including by requiring municipalities to enact costly measures to mitigate contamination. Each city involved in the Monsanto litigation has been required to take such measures, at times costing tens of millions of dollars, to remediate, monitor, investigate, mitigate, and/or remove PCBs from waters along the west coast.

The cities requested to consolidate and transfer their cases to the Northern District of California so as to avoid conflicting pretrial discovery, ensure uniform and expeditious treatment of the actions, and in the interest of convenience for the witnesses and parties. The cities stressed the common issues between their cases, including whether Monsanto manufactured and sold PCBs, whether Monsanto knew PCBs were a "global contaminant," the harms and risks caused by PCBs that Monsanto was aware of, the steps Monsanto took to continue selling PCBs despite the risks, and the fate of the contaminants today. The District Court was chosen primarily because it is where the majority of the cases are pending and where the majority of similar "tagalong" cases are expected to be filed by other municipalities, but also because several of the cases are already consolidated there, including the San Jose case which is leading all other cases in discovery, and for the central location between Washington and southern California.

In response, the Monsanto Defendants, three successors in interest to the former Monsanto Company, cited the fact that each suit was brought by a different municipality asserting different causes of action and legal theories and relating to geographically distinct bodies of water, each with their own sources of contamination. The bodies of water at issue in the suits are: the San Diego Bay, the San Francisco Bay, the Spokane River, and the Duwamish River. Monsanto asserted that consolidation was inappropriate due to the small number of cases, the diversity of significant fact-specific issues and outcomes sought, the inconvenience and lack of efficacy due to the need for highly location-specific evidence and witnesses, and the lack of necessity due to the coordination already occurring between parties.

The crux of Monsanto's argument was that each action presents its own unique questions of law and fact, because the cases involve contamination attributable to a "wide variety of pathways, sources and discharges far removed in time from the manufacture of PCBs." In support of its position, Monsanto cited numerous distinct legal rulings that will be required on discrete case-specific issues, including the history and sources of third-party contaminators, differing PCB levels for each body of water, the various municipalities' standing under California and Washington law to assert jurisdiction over the bodies of water, the circumstances regarding whether and by whom any remedial actions have been taken, and Monsanto's potentially dispositive defenses based on the unique factual circumstances of each case.

The Panel's Ruling

The Panel sided with Monsanto, concluding:

> …centralization is not necessary for the convenience of the parties and witnesses or to further the just and efficient conduct of this litigation.

While the Panel stated that it was undisputed that the actions shared questions of fact regarding allegations of PCB contamination in marine environments caused by Monsanto in the 1930s-1970s and the costs incurred, or to be incurred, by cites to remediate PCBs from urban runoff, stormwater, sediment, and bodies of water, the Panel declared that "is where the commonality among these actions ends." The Panel placed emphasis on the different bodies of water at issue and the undoubtedly differing factual questions relating to the sources of contamination that would arise as the cities do not allege direct contamination by Monsanto, but rather that PCBs were incorporated into other products that then leached into the environment.

Given that the proponents of centralization bear the "heavier burden to demonstrate centralization is appropriate where only a minimal number of actions are involved," the Panel found that such burden was not met. Because the three northern California actions had already been consolidated, the cases really presented only four distinct actions for further consolidation. The Panel found that as all of these actions are presently pending within the Ninth Circuit, which reduces the risk of inconsistent, substantive pretrial rulings, and because there were several factors, including Monsanto's assured willingness to cooperate, that would facilitate informal coordination of discovery in the actions, together with the limited number of counsel involved (only one plaintiff is represented by entirely separate counsel, and defendants are all represented by the same firm), that:

> …informal coordination between the involved courts and cooperation between the parties appear[s] imminently feasible and preferable to centralization.

Conclusion and Implications

While the cities may have been attempting to gain an advantage by situating the litigation in a forum favorable to their causes and issues, after the Panel's ruling, going forward, each case will be heard in its own respective community. It remains to be seen if cooperation and "informal coordination" will in fact be accomplished by the parties, and as to the impacts the addition of numerous other "tagalong" filings by other cities facing similar costs for PCB remediation could have on attempts to coordinate and consolidate such litigation in the future.
(Danielle Sakai, Alexandra Andreen)

DISTRICT COURT WILL HOLD TRIAL OF WATER QUALITY VIOLATION ALLEGATIONS AGAINST WATER TREATMENT DISTRICT IN CHICAGO—FINDS 'PERMIT SHIELD' DEFENSE DOES NOT APPLY TO VIOLATIONS OF STATE WATER QUALITY STANDARDS INCORPORATED INTO NPDES PERMIT

Natural Resources Defense Council v. Metropolitan Water Reclamation District of Greater Chicago, ___F.Supp.3d___, Case No. 11-cv-02937 (N.D. Ill. Apr. 20, 2016).

In a decision handed down in final form on April 20, 2016, U.S. District Court Judge John Tharp analyzed cross motions for summary judgment by environmental group plaintiffs and the Metropolitan Water Reclamation District of Greater Chicago (District) in a case that alleges the District is violating its Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit by causing water quality standard violations due to excess phosphorus discharges.

Background

As part of a campaign of several years of pressure on authorities in Chicago and the State of Illinois to improve the water quality in the Chicago River and other local waterways, the Natural Resources Defense Council, Sierra Club, and Prairie Rivers Network filed suit in 2011 under the Citizen Suit provisions of the federal Clean Water Act. The court's ruling denies both parties' motions.

The complaint alleges that the District is violating its National Pollutant Discharge Elimination System (NPDES) discharge permits for three sewage treatment centers that it owns and operates. The violation alleged is that excessive phosphorus in the discharges takes up so much oxygen that water quality standards downstream, including in the Illinois River, are violated. The District's permit application disclosed substantial phosphorus being discharged from each treatment works. The discharge limitations in the permit that are pollutant specific do not include a numeric phosphorus effluent limitation. However, the state inserted a Special Condition that states that the District's effluent must not cause Water Quality Standard violations.

The District's motion raised two arguments: 1) that the court did not have the proper expertise to determine the existence or not of water quality violations, and that it should defer and dismiss the case under the doctrine of Primary Jurisdiction, there being expert agencies set up to make that judgment. Alternatively, it asserted 2) the District is protected by the Permit Shield provisions of the Clean Water Act. Having disclosed its discharge of phosphorus, failure of the state to limit that parameter meant there was no permit violation possible for phosphorus discharges.

The District Court's Rulings

Judge Tharp made short work of the Primary Jurisdiction prong of the motion. He pointed out that there was no actual proceeding before any actual government agency dealing with question in front of him. Although there had been prior related proceedings in the Illinois Pollution Control Board, and permit proceedings in the Illinois EPA, the District nominated no place or agency as "primary." It sought pure dismissal. Moreover, the Judge noted that the concept of a citizen suit for enforcement is part and important parcel in the Clean Water Act enforcement scheme. He saw no reason a court could not wrestle with the issue of permit compliance or not, even though it is complex, where Congress had provided a specific remedy by law in the courts.

Permit Shield Defense

As to the Permit Shield, the court took careful note of conflicting expert opinions being offered by the two sides. Under the circumstances, resolving these conflicts is going to call for a factual determination and analysis of contested facts. Thus Summary Judgment was inappropriate. The District cited *Piney Run Preservation Assn. v. County Commissioners*, 268 F.3d 255 (4th Cir. 2001), for the proposition that discharges disclosed to the permitting agency are "permitted" if not limited in the permit. The court aptly

added, however, that in the present Chicago case, there is an allegation of a limitation being expressed in the permit, i.e. the Special Condition against water quality violations. The fact that the causation of a water quality violation is partly a judgment call after consideration of expert testimony and relevant data does not make the determination outside of the court's power or ability to interpret and enforce the permit condition.

The plaintiff environmental groups also came away without success on their motion for Summary Judgment on the merits of the case. Plaintiffs filed expert affidavits saying there are clear violations of the water quality standards due to excessive phosphorus from the District's facilities. Clearly, they said, there was a regular and repeated violation of DO levels and excessive algal growth that were due to the District's phosphorus rather than natural factors. Summary Judgment was requested. The District's expert opined there was insufficient data to show that the District was the cause of the DO and algae growth problem.

Conclusion and Implications

Under the circumstances, Judge Tharp found enough problems with the plaintiff's case to be unable to say that a reasonable jury (or finder of fact) would have to conclude there were Water Quality Standard violations. Therefore, the plaintiffs' motion for Summary Judgment was denied. There will have to be a trial, barring arrangement to submit the case on paper or settle it. The reasoning that Judge Tharp uses to render ultimate judgment on the merits will be of interest to the water law bar generally, inasmuch as USEPA and some states have been pushing numeric water quality standards because of the difficulty of consistent interpretation of narrative standards. (Harvey M. Sheldon)

DISTRICT COURT GRANT'S ARMY CORPS' REQUEST FOR VOLUNTARY REMAND OF MITIGATION BANKING INSTRUMENT FOR FURTHER PROCEEDINGS CONSISTENT WITH NEPA

Sierra Club, Inc. v. St. Johns River Water Management District, ___F.Supp.3d___, Case No. 6:145-cv-1877—Orl-40DAB (M.D. Fl. Apr. 4, 2016).

This case challenges several actions undertaken by the St. John River Water Management District (District), Miami Corporation, and the U.S. Army Corps of Engineers (Corps, collectively defendants) regarding the Farmington Mitigation Bank (FMB). The FMB is the largest federal mitigation bank, comprising 24,000 acres lying within the approximately 57,000 acre Farmton tract owned by the Miami Corporation. The 2000 FMB Enabling Instrument which established the FMB provides:

> …[t]he importance of this proposed bank is that it will preserve in perpetuity a very large amount of habitant… [and insulate it from] residential, commercial or agricultural development…[by creating] [s]ufficient legal interest and financial responsibility [ ] to ensure perpetual protection. (Court's Order, 2000 FMB Enabling Instrument ¶ 30.)

The Sierra Club alleged that the defendants have not been operating the FMB consistent with it perpetual conservation goals—specifically that while managing the FMB and selling credits, Miami Corporation has been pursuing long terms plans to develop the FMB. The issue presently before the District Court for the Middle District of Florida concerns the Corps' Motion to Remand Decision for Further Analysis. The Corps moved to remand its October 1, 2013 decision modifying the FMB's MBI for environmental analysis pursuant to the federal National Environmental Policy Act (NEPA). The Corps also sought to stay the proceedings for the time it took to complete its environmental analysis. The court granted the Corps' request:

> In order to conserve judicial resources, narrow or eliminate the issues at stake in this litigation, and allow the Corps to supplement the record, the Court will remand the October 1, 2013 MBI to the Corps for NEPA review. Granting the Corps' voluntary remand has the potential to

reduce, if not entirely resolve, the NEPA issues before the Court.

Background

FMB mitigation credits are sold pursuant to the federal Clean Water Act's (CWA) § 404 compensatory mitigation program, 33 U.S.C. § 1344(b)(1). As mitigation credits are sold, conservation easements are recorded on the corresponding parcels of land in the FMB. The District's role is to work in tandem with the Corps to administer the FMB, and as and serving as the grantee of conservation easements in the FMB. Miami Corporation, in furtherance of the environmental conservation goals of the FMB:

> …is dedicated to establishing [the FMB] as a mixed-use conservation area by retaining enough low-impact forestry and hunting to provide management funding for the bank in perpetuity. (*Id.*, 2000 FMB Enabling Instrument ¶ 32.)

Sierra Club took issue with several distinct actions taken by the defendants, each allegedly in furtherance of a plan to develop FMB land. On September 29, 2011, the District issued Permit No. 4-127-76185-4 (Permit) to Miami Corporation, enabling it to "remove 1,165.35 acres from the North Bank site of the FMB." On May 1, 2012, the District issued a "Partial Release of Conservation Easement" to Miami Corporation, which released "land encumbered with a conservation easement that is located within the FMB."

On October 1, 2013, the Corps published a Memorandum of Record empowering Miami Corporation "to remove 374.77 acres of wetlands and 110 acres of uplands in the North Bank Site," but also removing a corresponding 38.97 mitigation credits from the FMB. Additionally, the Corps issued an "Updated MBI" (Updated Enabling Instrument), which reflected the "buffer credit reduction" the Corps imposed on Miami Corporation as a result of the requested land removal from the North Bank Site.

Sierra Club alleged that massive residential and commercial development the Miami Corporation had planned in and around the FMB would have a myriad of negative impacts on the ecological carrying capacity of region, which would lead to habitat degradation. Sierra Club contended that the defendants' actions violated the CWA, NEPA, and the Administrative Procedure Act (APA).

The District Court's Decision

A voluntary remand is a request permitting the court to remand an agency decision back to the agency for reconsideration in lieu of final judicial consideration on the merits. Courts:

> …commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete. (*Ethyl Corp. v. Browner*, 989 F.2d 522 (D.C. Cir. 1993).)

Here, the Sierra Club argued that a remand would violate NEPA as the statute requires environmental review prior to an action. A court, however, has "broad discretion to stay proceedings as an incident of its power to control its own docket." (*Clinton v. Jones*, 520 U.S. 681, 706 (1997).) When fashioning a stay, a court must limit it in a moderate manner. The court, therefore, granted the remand in the interest of giving the Corps an opportunity to cure the NEPA deficiencies. Had the court held that the Corps had violated NEPA, then it still would have remanded the matter back to the Corps for further proceedings consistent with its findings—belying the Sierra Club's argument that a remand would violate NEPA:

> If an agency has not considered all relevant factors…the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. (*Protect Key West, Inc. v. Cheney*, 795 F.Supp.1552, 1563 (S.D. Fla. 1992).)

The court found that the Sierra Club will be afforded the opportunity to participate and comment during the Corps' NEPA review, and should it still be dissatisfied with the Corps' findings, it could challenge those findings in this or another proceeding.

Conclusion and Implications

The court saw this as a win-win situation. In the absence of prejudice to the Sierra Club—being that they would have opportunity to challenge the Corps'

further environmental analyses—the District Court saw the obvious path of granting the voluntary remand. The court all were best served by allowing the Corps the opportunity to further consider its actions which may impact the Farmington Mitigation Bank.

The court's decision is accessible online at: https://scholar.google.com/scholar_case?case=15334393963069874631&q=Sierra+Club,+Inc.+v.+St.+Johns+River+Water+Management+District&hl=en&as_sdt=2006&as_vis=1
(Thierry Montoya)

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